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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SCOTT ALAN LYLES, Defendant and Appellant.	B270897 (Los Angeles County Super. Ct. No. BA424734)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

The Los Angeles County District Attorney's Office charged Scott Alan Lyles (appellant) with the shooting murder of Ruben Castaneda (Castaneda). (Pen. Code, § 187, subd. (a).)[1] The information alleged that appellant personally and intentionally discharged a handgun causing great bodily injury or death. (§ 12022.53, subds. (b), (c), (d).) It was also alleged that appellant had five prior "strike" convictions and/or sustained juvenile petitions under the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12), three prior serious felony convictions (§ 667, subd. (a)(1)), and that he had served three prior prison terms (§ 667.5, subd. (b)).

A jury convicted appellant of second degree murder, and found the firearm allegations to be true. Subsequently, appellant admitted the priors. The trial court sentenced him to state prison for 85 years to life, calculated as follows: 45 years to life for murder (15 years to life, tripled pursuant to the Three Strikes law), plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), plus 15 years for the prior serious felony allegations. The enhancements under section 12022.53, subdivisions (b) and (c) were stayed. The sentence on the section 667.5, subdivision (b) allegations was stricken.

Appellant and Castaneda had a history of violence and animosity dating back more than 10 years before the shooting. Below, appellant claimed that at the time of the shooting, he feared for his life, Castaneda was armed, and appellant was forced to shoot Castaneda in self-defense. Appellant seeks reversal of his murder conviction on the grounds that his self-defense theory was undermined by various errors. He asserts:

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

(1) the trial court erred in admitting his police interview (during which he failed to claim self-defense) because it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (2) the trial court erred in precluding a defense witness, Richard Okihiro (Okihiro), from testifying that Castaneda, at an unspecified time, stated that he was going to kill appellant; (3) the trial court erred in precluding the defense from cross-examining Jose Mendez (Mendez) (a witness to the shooting who said Castaneda was not armed) about his mental illness, and whether it impacted his ability to perceive, recall and describe the shooting; (4) the trial court erred in instructing the jury pursuant to CALCRIM No. 3472 because it could have misled a reasonable juror into thinking that prior altercations between appellant and Castaneda that occurred long ago amounted to provocations that prevented appellant from claiming self-defense; and (5) prejudicial error requires reversal.

We find no error and affirm.

FACTS[2]

Prosecution Evidence

The 2002 Incidents

Lourdes Figueroa (Figueroa) married Castaneda in 1998. While he was in prison, Figueroa had a sexual encounter with appellant. She later disclosed the encounter to Castaneda.

In early 2002, appellant showed up at the home of Figueroa and Castaneda. Castaneda was armed, and shot at the floor. Afterwards, upon speaking about the sexual encounter between

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[2] Because we conclude that the trial court did not err, we have opted to include only those facts necessary give our opinion context.

Figueroa and appellant, appellant agreed to end the "dispute" and shook hands with Castaneda. Three days later, appellant again showed up at Figueroa and Castaneda's home. Appellant went into the bedroom and stabbed Castaneda about seven times. During this altercation, Figueroa heard a gunshot.

Castaneda's Incarceration

Castaneda stabbed and killed Jeffrey Baxley. As a result, on November 6, 2002, Castaneda entered a plea and was sentenced to state prison for 13 years on a charge of voluntary manslaughter. He was released from prison on December 28, 2013.

The Events of April 22, 2014

In the afternoon of April 22, 2014, Mendez visited a homeless friend named "Fred" in a tent near the 110 Freeway in Los Angeles. Castaneda was inside the tent, too. After about 45 minutes to an hour, Fred left. Mendez and Castaneda were joined by Cynthia Caldwell (Caldwell), who eventually left and "went to the bathroom." Castaneda said he was having problems with someone, and that they were looking for each other.

While outside of the tent, Caldwell saw appellant near the tent with a gun. Mendez heard someone say, "Hey man, come out." Castaneda went partially out of the opening of the tent. At no point did Mendez see anything in Castaneda' hands. According to Caldwell, there was nothing in Castaneda's hands when he came out of the tent; he was holding his hands at his side. She saw appellant point his gun at Castaneda and shoot him.[3] Mendez heard three to four gunshots and saw Castaneda

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[3] On direct examination, Caldwell testified that she saw the shooting. On cross-examination, she testified that she closed her eyes after hearing the first gunshot. Subsequently, on redirect,

fall to the ground. Neither Mendez nor Caldwell took any type of weapon from or near Castaneda's body.

Defense Evidence

Appellant testified in his own defense as follows:

In the mid-1990's, Castaneda had a reputation for being dangerous. Appellant had heard that Castaneda murdered a couple of people in the neighborhood, that he shot at the police, and that he was from the Avenues gang. When asked if he feared Castaneda, appellant said, "Everybody did."

Two years after a one-time sexual encounter with Figueroa, appellant was at a house on Meridian Street (Meridian House) in Los Angeles to see some friends. He knew that Figueroa was living in the same house. Castaneda confronted appellant. After appellant admitted the one-time sexual encounter, Castaneda pulled out a gun and accused appellant of disrespecting Castaneda by being with his girlfriend. Castaneda said he should shoot appellant in the legs, then fired in appellant's direction. After pulling out a knife, Castaneda said he was "ready for anything any time[.]" Appellant asked if he could leave, and Castaneda said, "Go ahead."

About a month later, appellant went to the Meridian House to get a ride from a friend. Castaneda emerged from Figueroa's bedroom and ran into appellant. Castaneda put his hand behind his back, and appellant assumed Castaneda was reaching for a gun. Appellant "bear-hugged" Castaneda and slammed him to the ground. Castaneda got his hand loose, put a gun to appellant's heart, and pulled the trigger as appellant turned,

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Caldwell testified that she clearly saw appellant shoot Castaneda.

shooting appellant in the left armpit. Castaneda held the gun to appellant's throat and tried to shoot but the gun jammed. While Castaneda was trying to unjam the gun, appellant pulled out a knife and repeatedly stabbed Castaneda until he dropped his gun. Appellant ran out of the house. He was hospitalized for four months and suffered permanent injuries to his left arm as a result of being shot by Castaneda. Appellant did not trust the police, so he did not talk to them about the incident.[4]

After appellant left the hospital, his girlfriend said Castaneda was going to kill appellant. Subsequently, on one particular night, appellant noticed a car "going around the block" and skidding to a stop and revving its engine in front of his house. Appellant's friend told him to be careful because Castaneda and his girlfriend were using a VW Rabbit, and that was the same car that had been skidding to a stop and revving its engine. Other people warned appellant that Castaneda was asking where he was and looking for him.

Sometime in 2002, appellant went to Megan Dickinson's house to visit his son and his son's mother. When appellant walked out of the garage with some friends, Castaneda began shooting at them.[5] On another occasion in 2002, appellant was at

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[4] On January 23, 2002, Los Angeles Police Officer Michael Arteaga responded to a shooting at a residence on Meridian Street in Los Angeles. Police officers located Castaneda. He had been stabbed multiple times. Appellant was identified as the victim of a shooting.

[5] Lee Douglas Dickinson, Megan Dickinson's father and long-time friend of appellant, corroborated appellant's account of the shooting, and testified that in 2002 Castaneda had a reputation for being violent.

the Meridian House in the room of his friend, Tennessee. Another friend informed appellant that Castaneda had arrived at the house. Appellant could hear Tennessee yell, "Don't point that in my face. Don't put that in my face." She also said, "There's no one in there. I just got here." Castaneda demanded that she open the door to her bedroom. Appellant left through Tennessee's bedroom window.[6]

Everywhere appellant went, Castaneda would show up with a gun. Castaneda pulled a gun on appellant's friends and their girlfriends while looking for appellant. After the shooting incident at the Meridian House, appellant began carrying a gun. He feared Castaneda and the Avenues gang. When Castaneda was hunting appellant, no one wanted appellant around, and there were very few places that he could go. It "screwed with" his head.

In 2003, appellant was convicted of possession of a firearm by a felon and sent to prison. He was released on February 10, 2014.

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[6] Valerie Lynn Westek (Westek) lived in the Meridian House. She testified that appellant showed up at the house scared. When Castaneda arrived, appellant went to the back of the house to Tennessee's room. Castaneda had a gun and was looking for appellant. He had a "wild look" in his eyes and tried to "go to" where appellant was, but Tennessee "wouldn't open the door." Castaneda threatened Westek with his gun. According to Westek, "He said he should have killed me and . . . and that he was planning on killing anybody in the house that got in his way." About a week later, Westek saw appellant on York Boulevard. Appellant appeared to be scared, and he "took off right away." About 10 minutes later Castaneda arrived and indicated he was looking for appellant.

After appellant was released from custody, he was homeless and living at the "river" most of the time. Appellant was warned that Castaneda was looking for him at the river. A friend had reportedly seen Castaneda in the vicinity of the tent occupied by Eddie Singletary (Singletary). On April 22, 2014, appellant spoke to Singletary by phone. Singletary indicated that he was with Castaneda and said, "Now is your chance to squash this and talk to him." Because of Castaneda's past actions, appellant armed himself with a gun before going to Singletary's tent to see Castaneda.

Caldwell was in the walkway outside the tent. Appellant said he did not want any problems, and that he was ready to talk. Caldwell entered the tent. Appellant could see into the tent through an opening, and he saw Caldwell bent over in front of someone. She said, "He's here. He's here. He's here." Feeling uneasy, appellant began backing away from the tent. Caldwell exited the tent and said, "He knows you're here." Caldwell walked up close to appellant and extended her hands. As soon as she did that, Castaneda came bursting out of the tent. Appellant hit Caldwell's hands and took two big steps back. He saw a gun in Castaneda's hand. Instantly, appellant knew he had been tricked, and that the plan was for him to be murdered by Castaneda. Appellant reached for his gun. Caldwell was between him and Castaneda in a direct line. After appellant "step[ped] out of the way to avoid her," he fired four times. Castaneda was facing appellant. He took a step back, twisted to his left while bending over at the waist, and then brought the gun up over his shoulder. Appellant turned and ran away.

DISCUSSION

I. *Miranda*.

Appellant contends that he was improperly interrogated by the police before he received a *Miranda* admonition, and that the statements he made during the interrogation should have been suppressed. Also, he posits prejudice because the prosecution argued that one reason his self-defense argument lacked credibility was because he did not assert it when he was first interviewed. In other words, he contends there was prejudice due to what he did not say. As we discuss below, no statements were induced by a practice the police should have known was reasonably likely to evoke an incriminating response. In addition, there is no law making a failure to assert self-defense inadmissible under *Miranda*.

A. Relevant Facts and Proceedings.

Appellant was arrested on July 2, 2014. He was admitted to the Jail Ward at County-USC Hospital.[7] The next day, appellant was interviewed by Los Angeles Police Detective Miguel Barajas and his partner. After Detective Barajas obtained biographical information from appellant, the following colloquy ensued:

"DETECTIVE BARAJAS: Okay, well, I think you know why we're here. And I think by now you know why you're here, you know.

"APPELLANT: Yeah, you're saying I killed somebody.

"DETECTIVE BARAJAS: Okay.

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[7] Appellant testified that he was treated for a Staph infection. The prosecutor said appellant was hospitalized due to gangrene.

"APPELLANT: I would really like to talk to you because it's bigger than you guys think . . . or maybe you guys already know. It's got to do with gangs, drugs, heroin, prostitution, Mafia. . . . [A]ll that shit and, uh, I would like to talk to you but I don't trust you guys.

"DETECTIVE BARAJAS: Mr. Lyles, I'm pretty straight forward sir, I'm really mellow. This is how I am—the way I'm talking to you is the way I am all the time, okay. We're pretty straight forward and we [would] like to hear your side of what happened you know—but before that obviously we have to read your rights you know.

"APPELLANT: Like I said, I'd like to talk to you. . . .

"DETECTIVE BARAJAS: Okay.

"APPELLANT: Because it's bigger than you guys think, or maybe you guys already know how big it is."

The prosecution proposed to play a recording of the preceding colloquy. The defense objected based on *Miranda*, claiming that Detective Barajas's first statement was designed to elicit an incriminating response. The trial court considered the question a close call, and indicated that context was the deciding factor. Ultimately, the trial court overruled the objection.

The recording was played for the jury.

After the jury heard the recording, Detective Barajas testified that he had been assigned to this case from the beginning, and the first time he heard appellant claim self-defense was at the preliminary hearing.

In his closing argument, the prosecutor argued that appellant's self-defense theory lacked credibility because he did not claim self-defense when he was first interviewed by the police.

B. Analysis.

"[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300–301, fns. omitted (*Innis*).)

Here, because the facts are undisputed, our review is independent. (*People v. Weaver* (2001) 26 Cal.4th 876, 918.)

According to appellant, it was the functional equivalent of an interrogation when the detective said, "Okay, well, I think you know why we're here. And I think by now you know why you're here, you know." The problem with this argument is that the detective merely made a statement of inference, i.e., the detective was inferring that because appellant had been arrested, he knew why the detectives were talking to him and asking for his biographical data. The statement did not call for an incriminating response. (*People v. Huggins* (2006) 38 Cal.4th 175, 198 ["telling defendant he was a murder suspect did not call

on him to confess"]; *People v. Haley* (2004) 34 Cal.4th 283, 300, 302 ["A brief statement informing an in-custody defendant about the evidence that is against him is not the functional equivalent of interrogation because it is not the type of statement likely to elicit an incriminating response"].) This is confirmed by appellant's response, which was to say, "Yeah, you're saying I killed somebody." He was merely stating what he believed. This response was not incriminating.

At the heart of appellant's contention is that he was prejudiced by what he did not say. But he did not cite any law establishing that *Miranda* is implicated in this context. Even if we were to conclude that the statement was the functional equivalent of an interrogation, we would decline to create a new rule that *Miranda* would make the absence of a statement inadmissible.

II. Exclusion of Castaneda's Threat.

Appellant contends that the trial court excluded Okihiro's testimony that he heard Castaneda say he was going to kill appellant on the ground the statement was too remote in time, and because Okihiro's testimony was inadmissible hearsay. According to appellant, *People v. Brust* (1957) 47 Cal.2d 776 (*Brust*) establishes that the statement was neither too remote nor hearsay. Appellant's contention lacks merit because Castaneda's statement was offered for a hearsay purpose, and appellant failed to establish a hearsay exception.

A. Relevant Facts and Proceedings.

In the prosecutor's opening statement, he averred that appellant went to Castaneda's tent at a homeless encampment, called for Castaneda to exit the tent, and shot him before he fully emerged. According to the prosecutor, appellant could not claim

self-defense because he sought to retaliate against Castaneda for past altercations by bringing a gun to a situation in which appellant had been informed that Castaneda would be vulnerable. During defense counsel's opening statement, he related a different narrative. He maintained that appellant went to the tent because he was told that Castaneda wanted to talk about a truce. Because appellant was afraid, he brought a gun. Castaneda came out of the tent and pointed a gun at appellant "as though he was going to finish the job from years before." Appellant then shot Castaneda in self-defense.

During a break in the defense case, the trial court stated, "So I've been provided with a statement that Mr. Okihiro provided to defense investigators, and I've read that statement at this point in time. [¶] The question is whether and what Mr. Okihiro would testify to."[8] The trial court asked defense counsel what he was seeking to present. Defense counsel stated: "The [Evidence Code section] 1103 portion of Mr. Castaneda's being armed [*sic*] and saying he was going to kill Mr. Lyles is the most important portion. I would argue that the other portion of his would go to . . . Mr. Castaneda's state of mind."

The prosecutor argued that Castaneda's state of mind was "not the issue," and noted that "[w]e're looking at the events and facts surrounding April 22[, 2014]." Further, the prosecutor said

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[8] Appellant requests that we take judicial notice of the statement provided to the trial court on the theory it is a fact capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452, subd. (h).) The request is denied. There is no basis for us to conclude that the report attached to the request for judicial notice is the same report that was submitted to the trial court as an offer of proof.

Okihiro's proposed testimony would constitute hearsay and was therefore inadmissible.

The trial court stated: "Had Mr. Okihiro relayed the information to [appellant], it would clearly be relevant at that point in time, although the statement clearly indicates that Mr. Okihiro did not relay the information to [appellant]. So the statements Mr. Castaneda is making to Mr. Okihiro are hearsay, and I find that they do not fall within the hearsay exception of the declarant's then existent state of mind; however, because of the relatively limited time frame that we are talking about between Mr. Castaneda being released from prison and the incident at hand, I would allow Mr. Okihiro to testify that at some point in . . . that limited time frame, Mr. Castaneda was seen by Mr. Okihiro in possession of a .38 caliber revolver."

At the time of trial, Okihiro was 41 years old. He testified that since he was 15 years old, he had known Castaneda, and they were good friends. Castaneda was a member of the Avenues gang and could be violent at times. They were in prison together from 2005 through 2008. Following Castaneda's release from prison in early 2014, Okihiro saw Castaneda with a gun on two to four separate occasions.

B. Analysis.

We review evidentiary rulings for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 (*Guerra*).)

In his opening brief, appellant argues: "Mr. Castaneda was released on parole on December 28, 2013[,] and was killed April 22, 2014, less than four months later, so the statements Mr. Okihiro heard were made within that period. Two of the statements in *Brust* were made seven and four months before the victims's death. Exclusion of the evidence in this case as too

remote in time was inconsistent with the holding in *Brust*." We need not dwell on this argument. At no point did the trial court rule that Castaneda's statement was subject to exclusion because it was too remote in time.

In his reply brief, appellant argues that, under *Brust*, "Okihiro's [testimony] was not vulnerable to a hearsay objection." According to our Supreme Court's *Brust* decision, a "victim's expressions of hostility to defendant tend to show the existence of hostility. The existence of hostility tends to show the probability of hostile conduct toward defendant." (*Brust*, *supra*, 47 Cal.2d at p. 784.) Out of court statements "are not vulnerable to [a] hearsay objection" if they are offered as "circumstantial evidence of [the declarant's] feeling toward defendant." (*Id.* at p. 785.) Based on this, appellant suggests he should have been permitted to adduce testimony of Castaneda's threat for the nonhearsay purpose of proving his hostility toward appellant. But appellant did not seek to offer it for that purpose. Rather, he offered it as evidence of Castaneda's character or trait under Evidence Code section 1103, subdivision (a)[9] in order to prove his conformity

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[9] Except as provided in, inter alia, Evidence Code section 1103, evidence of a person's character or trait is inadmissible to provide his or conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).)

"In a criminal action, evidence of the character or a trait of character (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by [Evidence Code] Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, § 1103, subd. (a).)

with that character or trait. As a result, appellant's reliance on *Brust* is misplaced.

In any event, even if we assumed the existence of *Brust* error, we would not perceive prejudice to appellant because there was ample evidence of Castaneda's hostility toward appellant based on their years of feuding and fighting during which, on one occasion, Castaneda shot appellant. As a consequence, appellant could not persuasively assert that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Notably, appellant does not urge us to find an abuse of discretion under Evidence Code section 1103, subdivision (a). More specifically, he does not argue that the statement qualifies as conduct evidence of Castaneda's character or trait. Properly viewed, Castaneda's statement, if anything, was evidence of his plan, intent or state of mind. But it was not offered for that below. It was specifically and only offered as Evidence Code section 1103, subdivision (a) evidence.

Even though appellant did not articulate a desire at trial to adduce Castaneda's threat to demonstrate plan, intent or state of mind[10] regarding his fatal confrontation with appellant, the parties nonetheless spend ample amounts of their briefs discussing whether this was an applicable hearsay exception. Though this issue is moot because it was not raised below, we note the following.

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[10] Defense counsel referenced state of mind with respect to portions of Okihiro's proposed testimony other than his proposed testimony about Castaneda making threats and being armed.

With respect to the hearsay use of hostile statements, *Brust* stated: "Insofar as the evidence is hearsay, the following analysis [citation] is pertinent: 'it is admissible only if there appears to be a necessity for that type of evidence and a circumstantial probability of its trustworthiness [citation], and if it falls within an accepted exception to the hearsay rule. . . . The death of the declarant [can create] the necessity for resort to hearsay[.]" (*Brust*, *supra*, 47 Cal.2d at p. 785.) Our Legislature gives us these additional considerations. Subject to Evidence Code section 1252, evidence of a statement of the declarant's state of mind or emotion, including a statement of intent or plan, is not made inadmissible by the hearsay rule when it is offered to prove the declarant's state of mind at a time when it is at issue, or to prove or explain acts or conduct of the declarant. (Evid. Code, § 1250, subd. (a).) As an exception to the foregoing, Evidence Code section 1252 provides: "Evidence of a statement is inadmissible . . . if the statement was made under circumstances such as to indicate its lack of trustworthiness."

The only offer of proof before us on appeal is defense counsel's statement to the trial court that Castaneda was going to kill appellant. Defense counsel did not specify when the statement was made, or provide a context for it. The statement could have been made recently, or long ago. It could have been made in jest. Given the paucity of facts, it is impossible for us to determine—as required by *Brust*—whether there was a circumstantial probability that the statement was trustworthy. (*People v. Edwards* (1991) 54 Cal.3d 787, 820 [to be admissible under Evidence Code section 1252, "statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness"].) Appellant

contends that it was an abuse of discretion for the trial court to rule without clearing up any questions about the trustworthiness of the statement by either asking defense counsel for a more detailed offer of proof, or by questioning Okihiro. But appellant did not offer the statement under Evidence Code section 1250. Moreover, he did not cite any law to support his assertion. We need not discuss this issue further.

III. Limitation on the Cross-Examination of Mendez.

Appellant argues that the trial court erred when it refused to permit the defense to cross-examine Mendez regarding his reported diagnosis with mental illness. We conclude there was no abuse of discretion because: (1) the defense did not make an initial offer of proof, with foundation, regarding relevance as to whether Mendez's mental illness impacted his ability to perceive, recall or describe the shooting of Castaneda; and (2) even though the trial court left the door open for the defense to make an offer of proof, the defense never did.

A. Relevant Facts and Proceedings.

Prior to calling Mendez to the stand, the prosecutor informed the trial court that Mendez's speech was slurred in the video recording of his police interview on April 28, 2014, six days after the shooting. At the time, per Mendez, he was on medications for schizophrenia and bipolar disorder. According to the prosecutor, Mendez stated that he took his medication regularly, and that it did not affect his ability to remember the shooting. The prosecutor maintained that Mendez's use of medication was irrelevant to the issues.

The trial court stated, "I do believe that it is relevant to Mr. Mendez's ability to perceive the events, as well as recall them and relate them. So over the People's objection, I will allow some

questioning concerning the medication that Mr. Mendez is or was taking at the time. I don't want to spend that much time. So at a point in time, I would sustain my own [Evidence Code section] 352 objection, but I do believe it is relevant and probative."

Defense counsel asked if "the limitation on the questioning would be specific as to his diagnosis." In reply, the trial court stated, "I don't really care what his diagnosis is. Was he taking medication at the time? Does it affect his ability to perceive things, and the like? And I think [defense counsel] can point out that in the videotape that [Mendez] is speaking with slurred speech." The trial court asked defense counsel if he thought the diagnosis was relevant. Defense counsel replied, "Well, potentially[.] I'm not a doctor[,] but schizophrenia can affect, you know, hallucination; things of that nature." The trial court answered back as follows: "I have no idea whether it does or not, because I missed that day in law school. . . . If it comes to my attention it may affect a person's ability to perceive and the like, I'll be more than happy to appoint an expert for either side, a psychiatrist who can render a fairly rapid opinion on that. I'll leave Mr. Mendez on call, or we can call the panel psychiatrist to testify that the disease itself may affect the person's ability to perceive or recall or relate. [A]ll right, [defense counsel]? [¶] Are you satisfied with that?" Defense counsel said, "Yes, for now."

Summarizing, the trial court stated, "Then we'll just leave it up in the air for now. But now I don't want any questions as far as the diagnosis itself."

Mendez testified with the assistance of the Spanish interpreter. During cross-examination, defense counsel asked if Mendez noticed that he was slurring during his police interview. Mendez said there was an explanation, and stated that he had

been taking medication since 2007. Defense counsel asked, "The medication affects your ability to speak sometimes?" The prosecutor objected to Mendez's answer before the interpreter could translate it. At sidebar, the prosecutor and the interpreter informed the judge that Mendez had said that he was taking "medications for the mind." The judge ordered the answer stricken and it was not translated for the jury. When cross-examination resumed, Mendez testified that the medication affected his ability to speak. He said the medication did not affect his ability to see or hear, but it did make him feel "a little like" he needed "to rest a lot." On April 22, 2014, he was taking his medication. When asked if the medication affected his memory, he replied, "That is the purpose of the medication, to help me remember more."

B. Analysis.

As previously noted, evidentiary rulings are reviewed for an abuse of discretion. (*Guerra*, *supra*, 37 Cal.4th at p. 1113.)

"[T]he mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if such illness affects the witness's ability to perceive, recall or describe the events in question." (*People v. Gurule* (2002) 28 Cal.4th 557, 591–592.)

In arguing that he made a sufficient offer of proof, appellant relies on *People v. Huskins* (1966) 245 Cal.App.2d 859, 861–862 (*Huskins*) to establish error.

In *Huskins*, the defendant stood accused of molesting his six-year-old daughter, who was living with foster parents. The foster mother testified that on two occasions, the defendant took his daughter out and returned her in a disheveled and upset condition. On both occasions, the foster mother took the

daughter to a doctor, who found genital inflammation. The defendant testified that on "the day in question he and his wife worked around the house while their children played." (*Huskins*, *supra*, 245 Cal.App.2d at p. 861.) His wife testified that she was with the defendant, their six-year-old daughter and their other children "during the entire day of the visit and [their six-year old daughter] was undisturbed and in good physical condition when she left the house with her father to return to her foster home." (*Ibid*.)

"After the criminal conviction and during . . . sexual psychopathy proceedings, the defense discovered that [the foster mother] had instituted civil commitment proceedings against her own husband[, the foster father,] in 1951, accusing him of being a sex pervert who had attacked his own daughter and had performed sex acts with animals. These accusations were never proved. Rather [the foster mother] herself was found to be suffering from paranoid schizophrenia, and after her attempt at suicide was committed to Camarillo State Hospital, where she remained for a year and a half. The defense moved for a new trial, contending this newly-discovered evidence cast serious doubt on the credibility and motives of [the foster mother], the main prosecution witness, and suggested either that [the foster mother] was suffering from delusions and no crime had ever been committed, or that [the foster mother] had fabricated the accusations and coached the child in order to keep the child in her family, or that another person, the foster father, might have molested the child." (*Huskins*, *supra*, 245 Cal.App.2d at pp. 861–862.)

The trial court denied the motion for new trial and the reviewing court reversed. (*Huskins*, *supra*, 245 Cal.App.2d at

p. 863.) The *Huskins* court explained, "The defense, because of lack of knowledge, never had an opportunity at the criminal trial to cross-examine [the foster mother] about the charges she had made against her husband, her history of mental illness, and her commitment to a mental hospital, or to develop the theory that [the foster mother] to serve her own purposes had concocted the charges against [the defendant] in order to keep his children in her family. Every experienced trial attorney knows the devastating effect which pertinent cross-examination on a vulnerable subject can produce on a witness. On occasion the skillful use against a fabricating witness of ammunition such as that newly-discovered here may even cause the witness to break down on the stand and admit perjury in open court. Conversely, a witness who stands up well against such an assault tends to bring strengthened credibility to his evidence-in-chief." (*Ibid*.)

Further, the *Huskins* court stated that it was important for the trier of fact to observe the foster mother's demeanor while she explained "what brought about her prior unproved charges of child molestation against her husband. Her intimate involvement as accuser in two such matters could be the result of an unfortunate coincidence—or it could reflect a pattern of mind which predisposes her to jump to unwarranted conclusions on the subject. In our view this is one of those exceptional cases with unusual facts in which newly-discovered evidence impeaching the credibility of a prosecution witness makes a different result on retrial probable. [Citation.]" (*Huskins*, *supra*, 245 Cal.App.2d at p. 864.) The court proceeded to note that its "conclusion on the probability of a different result [was] fortified by the verdict [of] the jury [in] the sexual psychopathy trial, which, after hearing

the evidence impeaching [the foster mother], concluded that defendant was not a sexual psychopath." (*Ibid*.)

Appellant's argument boils down to this sentence in his opening brief: "While the proffer concerning Mendez was not as strong as the proffer in *Huskins*, it must be judged by a more lenient standard because it was presented prior to his testimony, not as newly-discovered evidence in a motion for new trial." This argument does not establish an abuse of discretion. Appellant did not cite any law regarding the standard for the offer of proof. Moreover, appellant's offer of proof was vague and equivocal and therefore did not establish a prima facie case for relevance. Defense counsel said Mendez's mental illness was potentially relevant, and suggested that schizophrenia could cause hallucinations. Defense counsel case did not say Mendez's mental illness *was* relevant, nor did he suggest he had consulted a mental health professional who would testify that Mendez's ability to perceive, recall or describe the shooting had been impaired by his mental illness.

Setting this aside for a moment, it cannot be forgotten that the trial court gave the defense the opportunity to revisit the issue. In other words, the trial court invited an offer of proof, and one was never proffered. Even though the defense did not have an opportunity to consult with a mental health expert when the issue first came to light, the defense could have done so later. Under these circumstances, it cannot be said that the trial court abused its discretion.

IV. CALCRIM No. 3472.

Appellant contends the trial court erred by giving CALCRIM No. 3472, which explains that a person does not have a right of self-defense if he or she provokes a fight or quarrel with

the intent to create an excuse to use force. According to appellant, a reasonable juror could have erroneously concluded that he provoked a fight or quarrel with Castaneda in 2002 and therefore could not claim self-defense on April 22, 2014. This contention lacks merit. CALCRIM No. 3472, taken together with the other jury instructions, made it clear that the provocation nullifying self-defense has to immediately precede the use of force.

A. Relevant Instructions.

1. *CALCRIM No. 505.*

The trial court instructed: "The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if: [¶] One, the defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] Two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and [¶] Three, the defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. The defendant's belief must have been reasonable, and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to

and appeared to the defendant, and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. The defendant's belief that he was threatened may be reasonable even if he relied on information that was not true. However, the defendant actually and reasonably believed that the information was true.

"If you find that Ruben Castaneda threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable. [¶] If you find the defendant knew that Ruben Castaneda had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person. [¶] If you find that the defendant received a threat from someone else that he reasonably associated with Ruben Castaneda, you may consider that threat in deciding whether the defendant was justified in acting in self-defense.

"A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily [injury] has passed. This is so, even if safety could have been achieved by retreating.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter."

2. *CALCRIM No. 571.*

Regarding imperfect self-defense, the jury was instructed as follows: "A killing what would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. [¶] If you conclude the defendant acted in complete self-defense, his action was lawful, and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if: [¶] one, the defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] and two, the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; but, [¶] three, at least one of those beliefs was unreasonable. . . .

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant's beliefs, consider all of the circumstances as they were known and appeared to the defendant. [¶] A danger is imminent if, when the fatal wound occurred, the danger actually existed, or the defendant believed it existed. The danger must seem immediate and present, so that it must instantly be dealt with. It may not be merely prospective or in the near future. [¶] Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created the circumstances

that justify his adversary's use of force. [¶] If you find that Ruben Castaneda threatened or harmed the defendant or others in the past, you may consider that information in evaluating the defendant's beliefs. If you find the defendant knew Ruben Castaneda had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs. [¶] If you find that the defendant received a threat from someone else that he associated with Ruben Castaneda, you may consider that threat in evaluating the defendant's beliefs.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in perfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder."

3. *CALCRIM No. 3472.*

In addition to the preceding, the trial court instructed: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

4. *Counsels' arguments.*

In closing argument, the prosecutor argued that appellant was not acting under the influence of fear. Rather, he went to Singletary's tent with a gun in order to confront Castaneda, who was unarmed. The prosecutor cited CALCRIM No. 3472 and stated that "self-defense cannot be contrived." He also stated, "A person does not have the right to self-defense if he or she provokes a fight or quarrel, with the intent to create an excuse to use force. You can't show up to a location with a loaded gun, drawn, ready to shoot and kill somebody. . . . Common sense.

The law applies common sense. Self-defense does not work that way."

Defense counsel argued that Castaneda was armed, and that appellant reasonably feared for his life when he shot Castaneda.

B. Analysis.

When addressing a claim of instructional error, an appellate court must "assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner." (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) A claim of instructional error is considered in the context of the entire record of trial, including the arguments of counsel. (*People v. Franco* (2009) 180 Cal.App.4th 713, 720.) Moreover, a claim of instructional error is reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

CALCRIM No. 3472 correctly states the law. (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334 (*Eulian*).)[11] Nonetheless, appellant claims the instruction may have been misleading given the facts of this case.

Appellant notes that a quarrel can last for years. Thus, he suggests that the jury could have concluded that appellant was

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11 The instruction "might require modification in the rare case in which a defendant intends to provoke only a nondeadly confrontation and the victim responds with deadly force." (*Eulian, supra,* 247 Cal.App.4th at p. 1334.) This is not a case in which appellant intended to provoke nondeadly force. As a result, there was no need for the trial court to modify the instruction.

barred from claiming self-defense based on his 2002 actions. But the prosecutor never argued that appellant's 2002 actions nullified his self-defense theory. Moreover, it would have been unreasonable for the jury to conclude that appellant's actions in 2002 were intended to create an excuse to use force at a specific date and time approximately 12 years later, or to conclude that his 2002 actions barred him from ever defending himself against Castaneda. It is not likely the jury applied the instruction in an impermissible manner.

V. Cumulative Error.

Given the absence of any error, we need not address appellant's claim that he was prejudiced by cumulative error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.